No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

HARRIET PAULEY,
Survivor of JOHN C. PAULEY,

Petitioner,

vs.

BETHENERGY MINES, INC., and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

Section 402(f)(2) of the Black Lung Benefits Act, 30 U.S.C. § 902(f)(2), provides that, in determining the eligibility of certain claimants for black lung benefits, "[c]riteria applied by the Secretary of Labor . . . shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973." In *Pittston Coal Group v. Sebben*, 109 S. Ct. 414 (1988), this Court held that, under Section 402(f)(2)'s directive, the "criteria" the Secretary of Labor applies to such claims must be at least as favorable to the individual claimant as the "criteria" in the Department of Health Education and Welfare ("HEW") interim provision at 20 C.F.R. § 410.490. *Id.* at 420-22.

The questions presented are:

1. Whether any of the rebuttal provisions of the Department of Labor ("DOL") interim regulation at 20 C.F.R. § 727.203 violates the "not . . . more restrictive" mandate of Section 402(f)(2) of the Black Lung Benefits Act when applied to claimants who meet the invocation requirements of the HEW interim provision at 20 C.F.R. § 410.490?

2. Whether Section 402(f)(2) of the Black Lung Benefits Act, if construed to prohibit an employer from defeating black lung benefit claims by application of any rebuttal provisions in the DOL interim regulation that are "more restrictive" than "criteria" in the HEW interim provision, violates the Due Process Clause of the Fifth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

The petitioner here is Harriet Pauley, who is proceeding as the survivor of her late husband, John C. Pauley. The respondents are Bethenergy Mines, Inc. and the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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By her attorneys, Harriet Pauley, proceeding as the survivor of her late husband, John C. Pauley, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App. 1, is reported at 890 F.2d 1295 (3d Cir. 1989). The opinions of the Benefits Review Board, App. 20, and the Administrative Law Judge, App. 23, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1989. App. 44. A timely rehearing petition was denied on February 6, 1990. App. 42. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The constitutional, statutory, and regulatory provisions involved in this case are the Fifth Amendment to the United States Constitution; Section 402(f) of the Black Lung Benefits Act, 30 U.S.C. § 902(f); 20 C.F.R. § 727.203; and 20 C.F.R. § 410.490. These provisions are set forth in Appendix F. App. 46.

STATEMENT

A. The Black Lung Benefits Act And The Interim Presumptions.

Under the Black Lung Benefits Act, 30 U.S.C. §§ 901 *et seq.* (1982 and Supp. V 1987) (the "Act"),[1] and implementing regulations,[2] coal miners who are or are presumed to be totally disabled due to "pneumoconiosis"[3] are entitled to the benefits the Act provides. *Pittston Coal Group v. Sebben*, 109 S. Ct. 414, 418 (1988).

"Part B" of the original 1969 statute instructed the Secretary of Health, Education and Welfare to process claims for black lung disability benefits filed between December 31, 1969 and December 31, 1972 and to pay, from appropriated federal funds, benefits to miners found eligible. Title IV of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, § 411(a), 83 Stat. 793. "Part C" of the statute instructed the Secretary of Labor to

[1] The Act began as Title IV of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 792. In 1972, Title IV was amended by and became known as the Black Lung Benefits Act. Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150. Subsequent amendments include the Black Lung Benefits Reform Act of 1977, Pub. L. 95-239, 92 Stat. 95 (1978), and the Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, 95 Stat. 1643.

[2] The two principal regulatory provisions here are 20 C.F.R. § 410.490 and 20 C.F.R. § 727.203, to which we often refer by their popular names: the "HEW interim presumption" or the "HEW interim provision" (§ 410.490) and the "DOL interim presumption" or the "DOL interim regulation" (§ 727.203). Citations to other regulatory provisions of 20 C.F.R. defining eligibility for black lung benefits (*e.g.*, 20 C.F.R. § 410.412) usually omit the 20 C.F.R. reference. All citations to 20 C.F.R. are to the 1989 edition.

[3] Medically, "pneumoconiosis" is defined as "inflammation commonly leading to fibrosis of the lungs due to irritation caused by the inhalation of dust incident to various occupations, such as coal mining, knife grinding, stone cutting, etc." Stedman's Medical Dictionary 1108 (24th ed. 1982). The Act defines "pneumoconiosis" differently as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b) (emphasis added). "Statutory" (or "legal") pneumoconiosis is therefore broader than "clinical" (or "medical") pneumoconiosis in that the former includes all respiratory and pulmonary impairments arising out of coal mine employment. But "statutory" pneumoconiosis is also narrower than "medical" pneumoconiosis in that it encompasses only conditions arising out of coal mine employment, not other types of work. In the statutory context, therefore, to refer to "pneumoconiosis arising out of coal mine employment" is, strictly speaking, redundant. However, we distinguish the existence of the medical disease from the question of whether it arose out of coal mine employment when to do so is clarifying.

process claims filed after December 31, 1972. *Id.* at § 422, 83 Stat. 796. These claims were to be paid by the miner's coal mine employer, *id.* at § 422(b), 83 Stat. 796, or if no coal mine employer could be identified due to insolvency or bankruptcy, then from federal funds. *Id.* at § 424, 83 Stat. 798.

HEW approved almost fifty percent of the black lung benefit claims it adjudicated in the first three years of the program. S. Rep. No. 743, 92d Cong., 2d Sess. 3 (1972). Congress concluded, however, that this approval rate was too low; it believed that deserving miners were being denied benefits because the "state of the [medical] art" was inadequate to ensure medical diagnoses of either disease or disability in many miners who were in fact "severely . . . impaired" from pneumoconiosis. *Id.* at 9. The lack of adequate medical facilities in the coal mine areas to perform diagnostic testing compounded the difficulties many miners faced in establishing the required medical proof, *id.* at 18, and contributed to a huge backlog of unadjudicated claims. *Id.* at 23.

Because of its dissatisfaction with the low claims approval rate and the backlog of claims, Congress amended the Act in 1972 to make establishing eligibility easier. Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150.[4] In addition, the Senate Labor and Public Welfare Committee expressed its expectation that HEW would "adopt such interim evidentiary rules and disability evaluation

[4] For example, Congress redefined "total disability" so that a claimant no longer had to prove that he was physically disabled from performing *any* job, but could establish eligibility if he could show that he was unable to engage in work comparable to his former coal mine work. Black Lung Benefits Act of 1972, Pub. L. No. 92-303 at § 4(a), 86 Stat. 153 (amending Section 402(f) of the Act).

criteria as will permit prompt and vigorous processing of the large backlog of claims." S. Rep. No. 743, 92d Cong., 2d Sess. 18 (1972). HEW responded to these amendments and the Committee's expectation by promulgating the HEW interim presumption at § 410.490. § 410.490(a).

The HEW interim provision established two methods by which a claimant could invoke a presumption that he was "totally disabled due to pneumoconiosis." § 410.490(b). Under the first method, a claimant could invoke the presumption if x-ray, biopsy, or autopsy evidence showed that he had medical pneumoconiosis, § 410.490(b)(1)(i), and if his pneumoconiosis arose, or was presumed to have arisen, out of coal mine employment. § 410.490(b)(2). Under the second method, a claimant with at least 15 years of coal mine employment could invoke the presumption if ventilatory studies meeting specified values showed that he suffered from a "chronic respiratory or pulmonary disease," § 410.490(b)(1)(ii), and if this impairment arose, or was presumed to have arisen, out of coal mine employment. §§ 410.490(b)(2), (b)(3).

If the claimant invoked the presumption under § 410.490(b), the Secretary could defeat the claim under § 410.490(c) in either of two ways. Under HEW's first rebuttal provision, the claim would be defeated by "evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work." § 410.490(c)(1). Under the second rebuttal provision, the claim would be defeated if the "evidence . . . establish[es] that the individual is able to do his usual coal mine work or comparable and gainful work." § 410.490(c)(2).

Under the original 1969 Act, only HEW had the authority to promulgate regulations governing the determination of eligibility. Title IV of the Federal Coal Mine Health

and Safety Act of 1969, Pub. L. No. 91-173, § 411(b), 83 Stat. 793 (1969). The 1972 amendments kept this arrangement even for the Part C claims filed after July 1, 1973 for which the Secretary of Labor had processing responsibility. Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (1972).[5] While HEW applied the interim presumption to Part B claims, it did not authorize DOL to apply the presumption to Part C claims. § 410.490(b). Instead, HEW required DOL to adjudicate its claims under the Part 410 "permanent" regulations, *see id.*, which were much stricter than the HEW interim regulation. *See Sebben*, 109 S. Ct. at 417-18.

The distinctions between the liberal HEW interim presumption applied to Part B claims and the strict permanent regulations applied to Part C claims generated dramatically different approval rates for Part B and Part C claims. As the Part B "claims approval rate increased, Labor's remained low." *Mullins Coal Co v. Director, O.W.C.P.* 108 S. Ct. 427, 437 (1987).

Just as the low HEW claims approval rate had prompted legislation in 1972 to increase approvals in the Part B program, the low DOL approval rate prompted legislation to achieve the same end under the Part C program. Under the Black Lung Benefits Reform Act of 1977, Pub. L. 95-239, 92 Stat. 95, Congress in fact sought to cure the low approval rate under the Part C program by legislating the same rule, the HEW interim provision, that HEW had developed in response to Congress' earlier dissatisfaction with the approval rate under the Part B program. These amendments added Section 402(f)(2), under which Congress directed the Secretary, during an "interim administrative regime" in which she was required to develop new permanent regulations, to adjudicate newly filed or pending cases using a set of interim standards "different from (and more generous than) those of the permanent HEW regulations." *Sebben*, 109 S. Ct. at 418.[6] In particular, Section 402(f)(2) required that these interim standards were to set forth "criteria . . . not . . . more restrictive than the criteria applicable to a claim filed on June 30, 1973" (*i.e.*, than the criteria applicable to a claim adjudicated under the HEW interim provision). *See Sebben*, 109 S. Ct. at 418.

As its response to the "not . . . more restrictive" mandate in Section 402(f)(2), DOL promulgated its own interim presumption at § 727.203. 43 Fed. Reg. 36818 (1978). DOL's presumption set forth criteria that were, in some respects, less restrictive than the criteria in the HEW interim provision. As we have discussed, the HEW presumption may be triggered only by x-ray, biopsy, autopsy, or ventilatory study evidence meeting specified requirements. § 410.490(b)(1). In contrast, the DOL interim presumption may be triggered by those types of evidence and also by any of three other types of evidence meeting specified requirements—blood gas studies, physicians' reports, or, when the miner has died, lay evidence. § 727.203(a).

However, the DOL regulation also includes other criteria that are "more restrictive" than criteria of the HEW provision. Indeed, in *Sebben* this Court invalidated one of them:

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[5] The 1972 amendments to the Act postponed the commencement of the Secretary of Labor's jurisdictional responsibility under Part C from January 1, 1973 to July 1, 1973. Black Lung Benefits Act of 1972, Pub. L. 92-303, § 5, 86 Stat. 155.

[6] Congress also required the Secretary to apply these interim standards to certain claims that had previously been denied. 30 U.S.C. § 902(f)(2). *See also* 30 U.S.C. § 945.

the DOL regulation's *invocation* requirement that a miner who presents x-ray, autopsy or biopsy evidence showing that he has pneumoconiosis must establish that he worked in the mines for 10 years even if he is able to establish that his pneumoconiosis arose out of coal mine employment. *Compare* §§ 410.490(b)(1)(i), (b)(2) *with* §§ 727.203(a), (a)(1). *See Sebben*, 109 S. Ct. at 419-23. As relevant here, the *rebuttal* provisions of the DOL interim regulation are also more restrictive than those in the HEW interim provision. The DOL regulation permits rebuttal of the presumption when the "evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment" (*i.e.*, "disability causation"). § 727.203(b)(3). This rebuttal avenue is absent from the rebuttal subsection of the HEW interim provision. *See* §§ 410.490(c)(1), (c)(2) (limiting rebuttal to proof that the miner is doing, or is able to do, his usual coal mine work or comparable and gainful work).[7]

B. This Case.

Petitioner Harriet Pauley's late husband, John C. Pauley, was a coal miner. App. 4. He worked in the mines for thirty years in a variety of jobs that involved heavy exposure to coal dust. App. 25.

[7] The DOL interim regulation also provides that the presumption may be rebutted when the "evidence establishes that the miner does not, or did not, have pneumoconiosis." § 727.203(b)(4). This rebuttal avenue, which is also absent from the HEW interim rebuttal provisions, *see* §§ 410.490(c)(1), (c)(2), is not directly relevant to the present case. The question of whether Bethenergy might have rebutted under § 727.203(b)(4) was never before the Third Circuit, which based its decision on other grounds.

John Pauley filed a claim for benefits under the Act in 1978. App. 3. The Director, Office of Worker's Compensation Programs (the "Director"), who makes initial adjudications of black lung claims, awarded benefits. App. 6. Mr. Pauley's employer, Bethenergy Mines, Inc. ("Bethenergy"), contested the award and requested a formal hearing before an administrative law judge. App. 3. After the hearing, the ALJ found that Mr. Pauley invoked the DOL interim presumption based on his 30 years of coal mine employment and x-ray proof of pneumoconiosis. §§ 727.203(a), (a)(1). App. 4. The ALJ found, however, that Bethenergy rebutted the presumption under § 727.203(b)(3) by evidence showing that Mr. Pauley's disability did not arise out of coal mine employment. App. 4. The ALJ nonetheless awarded Mr. Pauley benefits on the ground that § 727.203(b)(3) is not present in the HEW interim provision, so that applying § 727.203(b)(3) would violate Section 402(f)(2) of the Act under then-governing Third Circuit (*i.e.*, pre-*Sebben*) case law. App. 5-6. The Benefits Review Board affirmed. App. 6. Pursuant to 33 U.S.C. § 921(c) (as incorporated by 30 U.S.C. § 932(a)), Bethenergy appealed to the Third Circuit.

The Third Circuit reversed with directions for entry of an order denying benefits, App. 19, offering alternative holdings for its disposition. First, the *Pauley* court expressed its views: (a) that the "not . . . more restrictive" mandate in Section 402(f)(2) was meant to prohibit only the application of more restrictive "total disability" criteria than the "total disability" criteria in the HEW interim provision; and (b) that § 727.203(b)(3), the "disability causation" rebuttal provision of the DOL interim regulation, does not set forth any "total disability" criteria. App. 16-17. Accordingly, the court held that § 727.203(b)(3) does not run afoul of Section 402(f)(2), so that the ALJ erred

in refusing to allow Bethenergy to rebut the interim presumption under § 727.203(b)(3). App. 17. Alternatively, the *Pauley* court focused on the parenthetical cross-references to § 410.412(a)(1) in §§ 410.490(c)(1) and (c)(2) of the HEW interim provision. The court construed these cross-references to incorporate a "disability causation" rebuttal test identical to the one in the DOL interim regulation at § 727.203(b)(3). App. 17. Applying this reading of the HEW interim provision, the court held that § 727.203(b)(3) of the DOL interim regulation simply replicates "criteria" in the HEW interim provision and is therefore faithful to the "not . . . more restrictive" mandate of Section 402(f)(2). App. 17.[8]

While this case was pending in the Third Circuit, Mr. Pauley died. He is survived by his widow, Harriet Pauley, who is now pursuing her late husband's claim before this Court.

[8] The *Pauley* court did not also hold expressly that the HEW interim provision incorporates a rebuttal test like the one in the DOL interim regulation at § 727.203(b)(4), permitting an opponent of a claim to rebut a presumption of eligibility by showing that the miner does not or did not have pneumoconiosis. But if an opponent may rebut under the HEW interim provision by showing that the miner's total disability was not "due to" pneumoconiosis (disability causation), it would appear that he must also be permitted to rebut by showing that the miner did not or does not have pneumoconiosis at all. If so, then *Pauley* is properly read as concluding that both §§ 727.203(b)(3) *and* (b)(4) replicate, and are therefore "not . . . more restrictive" than, "criteria" in the HEW interim provision.

REASONS FOR GRANTING THE PETITION

The courts of appeals are divided on the issue of whether one or more of the rebuttal provisions of the DOL interim regulation at § 727.203(b) violate the Congressional command in Section 402(f)(2) that the "criteria" applied to claims subject to Section 402(f)(2) "shall not be more restrictive than the criteria applicable to a claim" adjudicated under HEW's interim provision at § 410.490. In *Sebben*, this Court expressly declined to consider the issue. *Sebben*, 109 S. Ct. at 423. But two courts, including the court below, have now upheld the DOL rebuttal provisions, and two courts and the Benefits Review Board have disapproved some of them. This conflict has substantial practical implications since the issue is presented in an estimated 1500-3000 black lung claims in which hundreds of millions of dollars in black lung benefits are at stake.[9] Moreover, the Third Circuit's resolution of the issue—that

[9] In his Petition for Rehearing at iv, *Taylor v. Clinchfield Coal Co.*, 895 F.2d 178 (4th Cir. 1990) (No. 87-3852), the Director stated that the panel "decision [in *Clinchfield*] directly affects approximately 500 black lung claims. The average benefit cost of a single black lung claim ranges from $118,215.88 in the case of an unmarried miner to $185,659.69 in the case of a married miner. *1980 Annual Report on the Administration of the Black Lung Benefits Act*, 32 (1981). Therefore, the potential financial impact of cases affected by the [*Clinchfield*] decision is more than sixty million dollars."

The estimate of 500 cases is presumably the number of black lung claims arising in the Fourth Circuit only; these are the only claims that *Clinchfield* would "directly affect[ ]." The total number of black lung claims that would be affected by this Court's authoritative resolution of the § 727.203(b) rebuttal issue is therefore much higher. Our estimate is from 1500-3000 claims. Under even the lower, and very conservative, estimate, the amount at stake is approximately $180,000,000.

the rebuttal provisions of the DOL interim regulation, including § 727.203(b)(3), are consistent with Section 402(f)(2)—is erroneous. Under these circumstances, plenary review of the Third Circuit's decision is warranted.

A. The Third Circuit's Decision Conflicts With The Decisions Of Two Other Circuits And The Benefits Review Board.

Four circuits and the Benefits Review Board have considered whether the rebuttal provisions of the DOL interim regulation are consistent with the "not . . . more restrictive" directive in Section 402(f)(2). The Sixth Circuit was the first court of appeals to address this question. In *Youghiogheny & Ohio Coal Co. v. Milliken*, 866 F.2d 195 (6th Cir. 1989), the ALJ determined that while the miner invoked the DOL interim presumption under § 727.203(a)(1) by x-rays positive for pneumoconiosis, the employer rebutted the presumption under § 727.203(b)(3) by proving that the miner's disability did not arise out of coal mine employment. Although the Benefits Review Board reversed, the Sixth Circuit ultimately directed reinstatement of the ALJ's order denying the claim. In doing so, the court rejected the miner's contention that the DOL rebuttal provision at § 727.203(b)(3) violates the "not . . . more restrictive" mandate in Section 402(f)(2). Based on its own prior cases, the court concluded (incorrectly, we believe) that the Section 402(f)(2) mandate applies only to invocation, and not to rebuttal, criteria because the "legislative intent of the Act [establishes] that all medical evidence must be considered in adjudicating claims." 866 F.2d. at 202. On this ground, it held the additional rebuttal criteria at §§ 727.203(b)(3) and (b)(4) consistent with Section 402(f)(2). *Id.*

The Seventh Circuit reached the opposite conclusion in *Taylor v. Peabody Coal Co.*, 892 F.2d 503 (7th Cir. 1989), *reh'g denied* (Order, February 1, 1990). There the ALJ also determined that the miner had invoked the DOL interim presumption under § 727.203(a)(1) by x-rays positive for pneumoconiosis and, concluding that the employer had not rebutted the presumption, awarded the miner benefits. The Benefits Review Board reversed this award. After originally affirming the Board, the Seventh Circuit, following *Sebben*, directed the reinstatement of the award. The court held that the rebuttal provision at § 727.203(b)(2) (ability to do usual coal mine work or comparable and gainful work), which the Benefits Review Board had applied to defeat the claim, was more restrictive than the companion HEW rebuttal provision, § 410.490(c)(2), in "one important respect." 892 F.2d at 506. According to the court, the [HEW] presumption cannot be rebutted by medical evidence [alone];" rebuttal of the HEW presumption also requires a non-medical showing, apparently a showing that the miner could do jobs that actually exist. *Id.* The *Peabody* court further observed that the DOL interim regulation at §§ 727.203(b)(3) and (b)(4) offers two grounds for rebuttal not found in the HEW interim regulation. *Id.* Expressly rejecting *Milliken*, the *Peabody* court found this scheme violative of Section 402(f)(2). 892 F.2d at 506-07. Under *Peabody*, therefore, an opponent of a Section 402(f)(2) claim cannot rebut under § 727.203(b)(2), (b)(3), or (b)(4).[10] In the *Peabody* court's view, this Court's

[10] *Peabody* permits an opponent to rebut under § 727.203(b)(1), which parallels, and is not more restrictive than, § 410.490(c)(1). The opponent may also rebut under § 410.490(c)(2), which is an analogue to § 727.203(b)(2). *Peabody* entirely forbids rebuttal under §§ 727.203(b)(3) or (b)(4), neither of which, in the *Peabody* court's view, has an analogue in the rebuttal provisions of § 410.490(c), or under § 727.203(b)(2) to the extent it is more restrictive than § 410.490(c)(2).

decision in *Sebben* establishes that Section 402(f)(2) was meant to prohibit the Secretary of Labor from imposing on Section 402(f)(2) claimants *any* more restrictive criteria than those found in the HEW interim regulation, including "evidentiary" or "adjudicatory" ones, even if "applied . . . on rebuttal." 869 F.2d at 507. *Compare with Milliken*, 866 F.2d at 200.

The *Peabody* court also held that the unavailability of the third and fourth DOL methods of rebuttal (§§ 727.203(b)(3) and (b)(4)) in Section 402(f)(2) cases is consistent with due process requirements. 892 F.2d at 507-08. The employer, in urging the contrary conclusion, had in fact challenged the constitutionality of Section 402(f)(2) itself, since that is the provision mandating that the §§ 727.203(b)(3) and (b)(4) rebuttal provisions cannot be employed in Section 402(f)(2) cases. Thus, the question of the constitutionality of Section 402(f)(2)—the second of the questions presented in this petition—arises if Section 402(f)(2) is read to void either of these rebuttal provisions.[11]

Following the Seventh Circuit's decision in *Peabody*, the Third Circuit issued its ruling below. As we have explained (pp. 9-10 *supra*), that ruling read the HEW interim provision to incorporate a disability causation rebuttal test akin to the one in the DOL interim regulation at § 727.203(b)(3) and, in the alternative, held that even if the HEW interim provision were read *not* to include a disability causation rebuttal test, thus making the DOL interim regulation "more restrictive," the DOL regulation's inclusion of § 727.203(b)(3) does not violate Section 402(f)(2).

[11] *Peabody* is the only court to have passed on the constitutional question. *See Dayton v. Consolidation Coal Co.*, 895 F.2d 173, 175-76 (4th Cir. 1990) (declining to pass on the constitutional question because the employer had not raised it and the Director had no standing to do so). We agree with the *Peabody* court's resolution of the issue.

Subsequently, the Fourth Circuit decided *Taylor v. Clinchfield Coal Co.*, 895 F.2d 178 (4th Cir. 1990), *reh'g denied* (Order, April 20, 1990). In *Clinchfield*, the ALJ found that the miner's blood gas studies invoked the DOL interim presumption under § 727.203(a)(3), an invocation method not available under the HEW interim presumption.[12] The ALJ nevertheless denied the claim, finding that the employer had rebutted the presumption under §§ 727.203(b)(3) and (b)(4). After the Benefits Review Board affirmed, the court of appeals reversed. The *Clinchfield* court agreed with the miner's argument that this Court's decision in *Sebben* requires the conclusion that because the §§ 727.203(b)(3) and (b)(4) rebuttal provisions of the DOL interim regulation are not included in the HEW interim provision, applying these rebuttal tests violates the

[12] Among the court decisions addressing the question of whether the rebuttal provisions of the DOL interim regulation square with Section 402(f)(2), only the Fourth Circuit's decision in *Clinchfield* concerns a miner who invoked the DOL presumption under either § 727.203(a)(3), (a)(4), or (a)(5) by means not available under the HEW interim presumption. *See* p. 7 *supra*. This distinction is significant because the Director has argued that the "not . . . more restrictive" mandate in Section 402(f)(2) does not protect claimants who invoke the DOL interim regulation under these additional invocation criteria. Petition for Rehearing at 2-5, *Taylor v. Clinchfield Coal Co.*, 895 F.2d 128 (4th Cir. 1990) (No. 87-3852). Whatever the correct resolution of this question, there is no circuit conflict respecting it. The existing circuit conflict is among decisions (including another Fourth Circuit decision, discussed *infra* at p. 16) that either affirm or reject the validity of one or more of the rebuttal provisions of the DOL interim regulation *as applied to claimants who can invoke a presumption by x-ray, autopsy, biopsy or ventilatory study evidence under* § 410.490(b). We have framed the first of the questions presented in this petition consistently with this fact.

"not . . . more restrictive" mandate of Section 402(f)(2). 895 F.2d at 182-83. The court then appears to have qualified that conclusion by stating (incorrectly, we believe) that one of the *invocation* provisions of the HEW presumption, § 410.490(b)(2)'s cross-reference to § 410.416, entails a proof akin to § 727.203(b)(3). 895 F.2d at 183. The court, however, did not address the question whether, in light of this reading of the § 410.490 invocation provisions, rebuttal under § 727.203(b)(3) is permissible.

The Fourth Circuit's decision in *Dayton v. Consolidation Coal Co.*, 895 F.2d 173 (4th Cir. 1990), *reh'g denied* (Order, April 20, 1990), was a companion to *Clinchfield*. Based on his qualifying ventilatory studies, the miner invoked the DOL presumption under § 727.203(a)(2), a method of invocation available under the HEW presumption as well. *See* p. 7 *supra*. The ALJ nevertheless denied benefits, finding that the employer successfully rebutted the presumption under § 727.203(b)(4) by showing that the claimant did not have pneumoconiosis. The Benefits Review Board affirmed. The Fourth Circuit, relying on *Clinchfield*'s holding that § 727.203(b)(4) was invalid as violative of Section 402(f)(2), vacated the Board's decision. "[A claimant like Dayton] must have his claim adjudicated under the less restrictive rebuttal standards of § 410.490," which does not offer a means of rebuttal akin to § 727.203(b)(4). 895 F.2d at 175. The court did not proceed to consider the question of whether application of the "less restrictive rebuttal standards" of the HEW interim provision to claims opposed by coal operators was consistent with due process requirements, holding that the Director, the only party to have presented that issue, had no standing to raise it. *Id.* at 175-76.

The conflict among the courts of appeals finds a parallel in the division between the Benefits Review Board and

the Director. The Board has held that the rebuttal provisions at §§ 727.203(b)(3) and (b)(4) transgress Section 402(f)(2). *Britten v. Florence Mining Co.*, 13 BLR 1-31, BRB No. 88-836 BLA (October 31, 1989). The Director, on the other hand, predictably takes and applies the contrary view, consistently with his position that the Third Circuit decided the present case correctly in all respects. Petition for Rehearing at 2, *Dayton v. Consolidation Coal Co.*, 895 F.2d 173 (4th Cir. 1990) (No. 89-3203).

The division we have described—between the Seventh Circuit, the Fourth Circuit, and the Benefits Review Board, on the one hand, and the Sixth Circuit, the Third Circuit below, and the Director, on the other—quite obviously creates substantial inequities in the administration of the black lung benefits program. Claims arising in the Sixth and Third Circuits may be defeated by application of any of the rebuttal provisions of the DOL interim regulation. *Milliken*, *supra*; *Pauley*, *supra*. Claims arising in the Fourth and Seventh Circuits may not be defeated by application of the rebuttal provision at § 727.203(b)(4). *Clinchfield*, *supra*; *Dayton*, *supra*; *Peabody*, *supra*. Claims arising in the Seventh Circuit also may not be defeated by application of the rebuttal provision at § 727.203(b)(2), if read to permit rebuttal by medical evidence alone, or by application of § 727.203(b)(3) under any circumstances. *Peabody*, *supra*. And the Fourth Circuit has left uncertainty about whether claims arising in that circuit may be defeated by application of the rebuttal provision at § 727.203(b)(3). *Clinchfield*, *supra*; *Dayton*, *supra*. Finally, claims arising in the remaining circuits, which have not yet spoken on the § 727.203(b) rebuttal question, are governed by one standard (rebuttal available under all the rebuttal provisions of § 727.203(b)) when they are initially adjudicated by the Director, but by another standard (no rebuttal under

§§ 727.203(b)(3) and (b)(4)) if and when they come before the Benefits Review Board. *Britten, supra.*

The conflict is clear and substantial. Only this Court can resolve it, and the substantial inequities that the continuing conflict is occasioning make that resolution essential.

B. The Third Circuit's Decision Erroneously Decides An Important Question Of Federal Law That This Court Should Resolve.

This Court's authoritative resolution of the question of whether one or more of the rebuttal provisions of the DOL interim regulation violate Section 402(f)(2) will determine whether hundreds of millions of dollars in benefits will ultimately be paid to thousands of black lung benefit claimants and their survivors. *See* note 9 *supra.* This fact alone makes the § 727.203(b) rebuttal question an important one, as do the substantial administrative inequities in the administration of the black lung program that judicial division over this question has generated. Moreover, in deciding this important question, the court below erred twice, since its alternate holdings are both wrong.

1. The HEW Interim Provision Does Not Include A Disability Causation Rebuttal Test Like The One At § 727.203(b)(3) Of The DOL Interim Regulation.

The court below held that §§ 410.490(c)(1) and (c)(2) of the HEW interim provision parenthetically reference § 410.412(a)(1) in order to incorporate a disability causation rebuttal test like the one at § 727.203(b)(3) of the DOL interim regulation. The court was wrong. The purpose of the parenthetical citation is instead to reference the full definition of "comparable and gainful work," the term that immediately precedes the citation to § 410.412(a)(1). The

definition of the term of art "comparable and gainful work" at § 410.412(a)(1) is "gainful work in the immediate area of his [the miner's] residence requiring the skills and abilities comparable to those of any work in a mine or mines in which he previously engaged with some regularity and over a substantial period of time (that is, '*comparable and gainful work*' . . .) . . . ." § 410.412(a)(1) (emphasis added). Because this definition is neither intuitively obvious nor set forth elsewhere in § 410.490, the cross-references to § 410.412(a)(1)'s definition of "comparable and gainful work" provide the clarification that the drafters of § 410.490 understandably believed they had an obligation to provide.

Without even considering this obvious explanation for the parenthetical references to § 410.412(a)(1) in the HEW interim provision, the court below observed simply that it "cannot understand" the references unless they were meant to incorporate a disability causation test. App. 17. On the face of the HEW interim provision, however, the *Pauley* court's "understanding" makes little sense. First, there is no apparent reason why HEW, if it had truly intended to incorporate a disability causation inquiry into its interim provision, would have chosen to effectuate that intent through a cryptic cross-reference, instead of spelling it out as it did under the permanent Part 410 regulations at § 410.426(a). Second, that the cross-reference appears in both rebuttal tests of the HEW provision (§§ 410. 490(c)(1) and (c)(2)) conflicts with the court's conclusion that HEW intended the cross-reference to incorporate a *single* rebuttal test for disability causation. Moreover, the "disability causation" issue cannot come into play for miners like those described in § 410.490(c)(1), who are still performing their usual coal mine work or comparable and gainful work: such miners lack the "disability" as to which "causation" can be determined.

The court below is the only court to have held or even suggested that the rebuttal tests of the HEW interim provision incorporate a disability causation test. As we have discussed, all other courts that have addressed the § 727.203(b) rebuttal question—including the Sixth Circuit in *Milliken*, which upheld the DOL rebuttal provisions—have construed the HEW interim provision's rebuttal subsections *not* to include a disability causation test. *Milliken, supra*; *Peabody, supra*; *Clinchfield, supra*; *Dayton, supra*. *See also Britten v. Florence Mining Co.*, 13 BLR 1-31, BRB No. 88-836 BLA (October 31, 1989) (following *Peabody*). Similarly, all the courts of appeals to have construed § 727.203(b)(2), which is identical in relevant respects to § 410.490(c)(2) and includes an identical cross-reference to § 410.412(a)(1), have also construed § 727.203(b)(2) *not* to include a disability causation test. *Oravitz v. Director, O.W.C.P.*, 843 F.2d 738, 740 (3d Cir. 1988); *Roberts v. Benefits Review Board*, 822 F.2d 636, 638 (6th Cir. 1987); *Sykes v. Itmann Coal Co.*, 812 F.2d 485, 488 n. 5 (4th Cir. 1987); *Wetherill v. Director, O.W.C.P.*, 812 F.2d 376, 379-80 (7th Cir. 1987) (dictum).

As support for his position that the cross-references to § 410.412(a)(1) in §§ 410.490(c)(1) and (c)(2) effectively incorporated a disability causation rebuttal test, the Director contended in his brief below that § 410.412(a)(1) sets forth a "definition of total disability which requires that pneumoconiosis be the cause of the disability." Brief for the Director, O.W.C.P. at 18-19, *Bethenergy Mines, Inc. v. Director, O.W.C.P. and Pauley*, App. 1 (No. 89-3364). This contention is incorrect. Although "total disability" is a statutory term of art and does provide that a miner's disability must arise out of coal mine employment, 30 U.S.C. § 902(f)(1)(A), the regulatory provision at § 410.412*(a)(1)* is not the provision defining that term. Rather, the regulatory definition of "total disability" is set forth at § 410.412 *in its entirety*. This distinction is significant because the references to § 410.412*(a)(1)* in the black lung regulations *always* appear immediately after the term "comparable and gainful work." §§ 410.426(a), 410.490(c)(1) and (c)(2), 727.203(b)(1) and (b)(2), 727.205(b). In contrast, the regulatory references to the *entirety* of § 410.412 *always* appear with the term "total disability" or "totally disabled." §§ 410.410(c), 410.414(b), 410.422(c), 410.424(a), 410.432(a), 410.454(b). Therefore, when the drafters of §§ 410.490(c)(1) and (c)(2) cited § 410.412(a)(1), rather than § 410.412 in its entirety, they meant to reference the term "comparable and gainful work," not the definition of "total disability" or the element of disability causation that the latter term subsumes.

2. The Disability Causation Rebuttal Provision At § 727.203(b)(3) Of The DOL Interim Regulation Violates Section 402(f)(2) Of The Act.

The *Pauley* court misinterpreted and misapplied Section 402(f)(2) when it concluded that § 727.203(b)(3) is consistent with that statutory provision. According to the court, the "not . . . more restrictive" mandate of Section 402(f)(2) is limited exclusively to "criteria . . . dealing with 'total disability,' " App. 17, by which the court obviously meant "criteria" pertaining only to the degree of a miner's impairment, not to the cause of the impairment. This premise, which the court derived from the fact that Section 402(f) in its entirety "deals with 'total disability,' " *id.*, was determinative for the court: if Section 402(f)(2) was meant to govern only the criteria pertaining to the degree of a miner's impairment, plainly § 727.203(b)(3), which pertains instead to the cause of a miner's disability, is consistent with Section 402(f)(2). App. 17.

Even if the *Pauley* court correctly read the "not . . . more restrictive" mandate in Section 402(f)(2) as applying only to "total disability" criteria, a reading that is "by no means free from doubt," *Sebben*, 109 S. Ct. at 420, the court's analysis would be wrong. This is because the court simply misunderstood what the statutory term "total disability" means. The statute, in Section 402(f) itself, defines "total disability" differently than simply the severity of a miner's impairments. Specifically, the statutory definition of the term provides that "a miner shall be considered totally disabled when *pneumoconiosis prevents* him or her from engaging in gainful employment requiring [certain] skills and abilities." 30 U.S.C. § 902(f)(1)(A) (emphasis added). "[T]otal disability" is therefore a term of art that not only specifies how severe a miner's impairment must be but also expressly requires that pneumoconiosis must be a cause of the impairment (*i.e.*, the definition subsumes "disability causation"). The Secretaries of HEW and Labor have in fact interpreted the term in just this way: their regulations defining "total disability" both expressly subsume "disability causation." §§ 410.412 (HEW), 718.204(b) (DOL).

When this complete definition of the term "total disability" is substituted for the incorrect one that the *Pauley* court assumed is applicable, that court's rationale in fact produces the correct conclusion: Section 402(f)(2) prohibits the Secretary from applying "total disability criteria," *including disability causation criteria*, that are more restrictive than any such criteria in the HEW interim provision. Consequently, the rationale of the *Pauley* court actually supports the position of Ms. Pauley here that the plain

language of Section 402(f)(2) prohibits the Secretary from applying § 727.203(b)(3) to claims like hers.[13]

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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[13] The legislative history, which the *Pauley* court ignored entirely, confirms what Section 402(f)(2) provides. We have not found anything in the legislative history of the 1978 amendments even suggesting that the Secretary could adjudicate Section 402(f)(2) claims using a disability causation rebuttal test or any other provision that would make the Secretary's standards more restrictive than those of the HEW interim provision. In contrast, the legislative history includes many statements to the effect that the Secretary is prohibited from applying standards of any kind that are more restrictive than those of the HEW interim provision. *E.g.*, H.R. Rep. No. 864, 95th Cong., 2d Sess. 169 (1978) ("so-called 'interim' Part B medical standards are to be applied to all reviewed and pending claims filed before the date the Secretary of Labor promulgates new medical standards for Part C cases"); 124 Cong. Rec. 3431 (1978) ("As for the Department of Labor, it too must apply the interim [Part B] standards to all [such] claims.* * * [T]his legislation gives no authority to the Labor Secretary to alter, adjust, or otherwise change the interim [Part B] standards.") (remarks of Rep. Perkins).

APPENDICES

APPENDIX A

Filed: December 7, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-3364

BETHENERGY MINES INC.,
Petitioner

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondent

and

JOHN C. PAULEY,
Respondent

On Petition for Review of a Decision and Order of the Benefits Review Board of the Department of Labor (BRB No. 88-2565 BLA)

Argued November 8, 1989
BEFORE: MANSMANN and GREENBERG, *Circuit Judges*, and GAWTHROP, *District Judge**

(Filed December 7, 1989)

* Honorable Robert S. Gawthrop, III, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

GREENBERG, *Circuit Judge.*

This matter, involving a claim under the Black Lung Benefits Act of 1972, codified at 30 U.S.C. § 901 *et seq.*, is before this court on a petition for review of a decision and order of March 28, 1989, of the Benefits Review Board by Bethenergy Mines Inc., the employer of the respondent John C. Pauley.

The factual and procedural history of the case is as follows. On April 21, 1978, Pauley filed a claim under the Benefits Act with the Office of Workers' Compensation Programs which, after initially approving the claim, notified Bethenergy of its potential liability as the responsible operator. Though Bethenergy controverted the claim, upon further consideration the Office of Workers' Compensation Programs adhered to its position. Bethenergy then requested a formal hearing which was held before an administrative law judge.

In his decision of May 3, 1988, the administrative law judge first analyzed Pauley's claim as a Part C claim under the interim regulations at 20 C.F.R. Part 727 since the claim was filed prior to April 1, 1980, the effective date of the permanent regulations for black lung claims. The judge noted that 20 C.F.R. § 727.203(a) contains a presumption for the benefit of miners with at least ten years coal mine experience that the miner has been totally disabled due to pneumoconiosis caused by his coal mine employment if he adduces medical evidence satisfying any of four requirements principally directed to establishing the presence of pneumoconiosis or a respiratory or pulmo-

nary impairment.[1] Pauley was entitled to the benefit of the presumption because Bethenergy conceded that he suffered from coal workers' pneumoconiosis and stipulated that he had 30 years coal mining experience.

The judge then considered whether Bethenergy had rebutted the presumption as permitted in various methods by 20 C.F.R. § 727.203(b). He first concluded that it had not done so under 20 C.F.R. § 727.203(b)(1) because Pauley had not worked since August 2, 1978, and thus was not doing his usual coal mine work or comparable and gainful work, a showing which if made would have rebutted the presumption. The judge also considered the claim under 20 C.F.R. § 727.203(b)(2) which permits rebuttal if, in light of all relevant evidence, it is established that the miner is able to do his usual coal mine work or comparable and gainful work. The judge did not find rebuttal under that provision because he concluded that Pauley had "several medical problems, including severe arthritis, residual hemiparesis as the result of a stroke, and pulmonary disease." The judge further set forth that "[a]lthough not all of the physicians agree as to the cause or causes of [Pauley's] total disability, the more recent medical evidence, supported by [Pauley's] credible testimony, clearly establishes that [Pauley] is totally disabled from returning to coal mine employment."

The judge next considered 20 C.F.R. § 727.203(b)(3) which provides for rebuttal if the "evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment." The judge, citing *Carozza v. United States Steel Corp.*, 727

[1] A fifth requirement relates to deceased miners where medical evidence is not available and is not applicable here.

F.2d 74 (3d Cir. 1984), set forth that under this subsection rebuttal could be established only if there was a finding that "pneumoconiosis does not contribute even in part to [a] claimant's total disability." After a thorough weighing of the evidence the judge concluded that Bethenergy "has sustained its burden of establishing that pneumoconiosis is not a contributing factor in [Pauley's] disability" and thus had succeeded in rebutting the presumption in Pauley's favor.[2] This finding is not challenged on this appeal.

The judge indicated, however, citing our opinions in *Halon v. Director, Office of Workers' Compensation Programs*, 713 F.2d 30 (3d Cir. 1982), *reinstated on rehearing*, 713 F.2d 21 (3d Cir. 1983), that inasmuch as this case arises within the jurisdiction of this court he was required to consider the claim under the regulation at 20 C.F.R. § 410.490. He found that in view of Bethenergy's concession that Pauley suffered from pneumoconiosis arising out of coal mine employment, Pauley was entitled to the presur ion of total disability due to pneumoconiosis in that section. He then said that 20 C.F.R. § 410.490 provides only two methods of rebuttal, either that there was evidence that the claimant was doing his usual coal mine work or comparable and gainful work or that evidence establishes that the claimant was able to do his usual coal mine work or comparable and gainful work. 20 C.F.R. § 410.490(c). Bethenergy could not show either type of rebuttal because Pauley had not worked since August 2,

[2] The judge also considered the claim under the permanent regulations at Part 718, see *Caprini v. Director, Office of Workers' Compensation Programs*, 824 F.2d 283 (3d Cir. 1987), but rejected it as Pauley was not able to show that he was totally disabled due to pneumoconiosis. *See* 20 C.F.R. §§ 718.202, 718.203, 718.204. This finding is not questioned on this appeal.

1978, and was, as the judge found, "clearly disabled from performing his usual coal mine work or comparable work as a result of his arthritis and residual hemiparesis." The judge further indicated that "[t]here is no evidence that [Pauley] is able to work in light of these conditions" and that, unlike 20 C.F.R. § 727.203(b), 20 C.F.R. § 410.490(c) "does not allow for rebuttal of the presumption by showing that the claimant's total disability is unrelated to his coal mine employment." Thus, Pauley was entitled to benefits.

After a motion for reconsideration by the administrative law judge was denied, Bethenergy appealed to the Benefits Review Board which affirmed in a two paragraph per curiam decision and order of March 28, 1989. The Board, after setting forth a concise history of the matter, held that: "In view of the decision of the United States Supreme Court in [*Pittston Coal Group v. Sebben*, 109 S.Ct. 414 (1988)], we reject [Bethenergy's] argument that the administrative law judge erred in applying [20 C.F.R.] Section 410.490 herein. Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed." (Omitting citations). The petition for review, over which we have jurisdiction under 30 U.S.C. § 932(a) and 33 U.S.C. § 921(c), followed.[3]

[3] In addition to contending that it had rebutted the presumption in favor of Pauley, Bethenergy urged the board to reverse the administrative law judge on the authority of *Whiteman v. Boyle Land and Fuel Co.*, 11 Black Lung Rep. 1-99 (Ben. Rev. Bd. 1988), which held that application of the Part B interim regulations under 20 C.F.R. § 410.490 to coal mine operators violated the Administrative Procedure Act as the operators had no interest in participating in the rulemaking when the regulations were adopted as at that time the program was federally funded. It had also raised this point on its motion for reconsideration by the administrative law judge. Bethenergy, however, does not press this point on the appeal and we thus regard it as abandoned and do not address it.

Disposition of this appeal requires an explication of the relationship between claims under Parts B and C of the Benefits Act.[4] The purpose of the Act is to provide for disability payments to a miner totally disabled at least in part by pneumoconiosis if the disability arose out of coal mine employment. *See Pittston v. Sebben*, 109 S.Ct. at 417; *Mullins Coal Co. v. Director, Office of Workers' Compensation Programs*, 108 S.Ct. 427, 431 (1987); *see also Bonessa v. United Steel Corp.*, 884 F.2d 726, 729 (3d Cir. 1989). The program, as originally conceived, provided for a bifurcated system of administration. The Secretary of Health, Education and Welfare was to adjudicate claims pursuant to a temporary program of federally funded benefits under Part B of the Act. 30 U.S.C. § 901(c), 30 U.S.C. § 921, Pub. L. No. 91-173, 83 Stat. 792-98 (1969).[5] *Pittston v. Sebben*, 109 S.Ct. at 417. Congress envisioned, however, that there would be a more permanent program, operating under the auspices of the Secretary of Labor, relying on state workers' compensation programs. In fact, no state programs were approved by the Secretary of Labor and thus Part C has become an exclusively federally run workers' compensation program administered by the Secretary of Labor. Claims filed for living miners prior to July 1, 1973, and by survivors of miners who died prior to January 1, 1974 were Part B claims and those filed on or after those dates are Part C claims.

[4] Inasmuch as we are deciding this matter on a legal issue we are exercising plenary review. *Carozza v. United States Steel Corp.*, 727 F.2d at 77.

[5] The black lung benefits program predated the Black Lung Benefits Act as it was originally enacted as Title IV of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 792-98 (1969). *See Pittston v. Sebben*, 109 S.Ct. at 417; *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 8, 96 S.Ct. 2882, 2889 (1976).

Eventually Congress became dissatisfied with the operation of the program and thus enacted the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978), largely codified, as is the Benefits Act itself, in various sections of 30 U.S.C. § 901 *et seq.* The Reform Act substantially altered the black lung regulatory scheme and amended 30 U.S.C. § 902(f) to provide the Secretary of Labor with authority to determine eligibility criteria for Part C claims. *See* 30 U.S.C. § 902(f)(1); *Pittston v. Sebben*, 109 S.Ct. at 418. In addition, the Reform Act required the reopening and, in some cases, readjudication of Part B claims previously denied by the Secretary of Health, Education and Welfare. *See* 30 U.S.C. § 945; *Halon v. Director*, 713 F.2d at 22. Furthermore, Part C claims filed or pending before the effective date of the Department of Labor's permanent regulations, April 1, 1980, as well as reopened Part B claims, were to be evaluated in accordance with interim standards promulgated by the Secretary of Labor. *See* 30 U.S.C. § 945.

The Reform Act in its subsection defining "total disability" placed the important restriction on the discretion of the Secretary of Labor in determining eligibility, that the criteria for any claim evaluated by him under 30 U.S.C. § 945 and any claim filed on or before the effective date of the permanent regulations, "shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973 . . . ." Inasmuch as the claims filed prior to July 1, 1973 were Part B claims, the effect of the Reform Act was to require a comparison of the Secretary of Labor's interim regulations with the earlier regulations of the Secretary of Health, Education and Welfare when a claim did not meet the criteria for approval under the Department of Labor's standards.

The regulations of the Secretary of Health, Education and Welfare provided two classes of interim presumptions to establish that a miner is totally disabled due to pneumoconiosis. First, a claimant could demonstrate presumptive entitlement by showing that a chest roentgenogram (X-ray), biopsy, or autopsy established the existence of pneumoconiosis and the impairment arose out of coal mine employment. 20 C.F.R. §§ 410.490(b)(1)(i), (b)(2). The proof of causality could be established by the invocation of a further rebuttable presumption for claimants with 10 years of coal mine employment, 20 C.F.R. §§ 410.416 or 410.456 or, without regard for the length of employment, by direct evidence. 20 C.F.R. § 410.490(b)(2). Alternatively, a claimant with at least ten years of coal mine employment could obtain presumptive entitlement by establishing specified scores on ventilatory tests. 20 C.F.R. §§ 410.490 (b)(1)(ii), (b)(3). *See Pittston v. Sebben*, 109 S.Ct. at 418.[6]

Both presumptions were rebuttable by a showing that the miner was working or could work at his former mine employment or could do comparable and gainful work. 20 C.F.R. § 410.490(c). There were, however, no provisions in 20 C.F.R. § 410.490(c) *expressly* comparable to those in 20 C.F.R. § 727.203(b)(3) and (4) providing for rebuttal if the evidence establishes that the miner's disability did not arise in whole or in part out of coal mine employment, the provision under which the presumption in favor of Pauley was rebutted, or that the miner does not have and did not have pneumoconiosis.

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[6] The Health, Education and Welfare regulation also provided that if a miner was unable to obtain the benefit of either presumption he could nevertheless establish his requisite disability under the permanent regulations of the Department of Health, Education, and Welfare. 20 C.F.R. § 410.490(e). *See Pittston v. Sebben*, 109 S.Ct. at 417-18. We, however, are not concerned with that provision as Pauley did obtain a presumption of entitlement.

The interplay of the Part 727 and Part 410 regulations gives rise to the issues on this appeal. Bethenergy contends that inasmuch as Pauley was entitled to the presumption of total disability due to pneumoconiosis under 20 C.F.R. § 727.203(a), the administrative law judge should not have considered the case under 20 C.F.R. § 410.490. Thus, in its view, the rebuttal provisions of 20 C.F.R. § 410.490(c) are inapplicable in this case and Pauley's presumption of entitlement remains rebutted under 20 C.F.R. § 727.203(b)(3). It further contends that even if the claim is considered under 20 C.F.R. § 410.490 it was rebutted under that regulation by the finding that Pauley's disability was not a result of his coal mine employment. Alternatively, it argues that if the claim is considered under 20 C.F.R. § 410.490 it nevertheless may be rebutted under 20 C.F.R. § 727.203(b). Finally, it contends that regardless of the application of the presumptions, Pauley cannot recover as the Benefits Act provides benefits only to miners who are totally disabled due to pneumoconiosis and Pauley is not such a peson.

The Director, Office of Workers' Compensation Programs, though indicating that his participation is limited to the legal issues of whether the administrative law judge and the Benefits Review Board properly applied our decision in *Halon v. Director*, 713 F.2d at 21, and the Supreme Court's decision in *Pittston v. Sebben*, 109 S.Ct. at 414, effectively supports Bethenergy's position. The Director argues that neither case requires the application of 20 C.F.R. § 410.490 to Pauley as he was entitled to the interim presumption of total disability due to pneumoconiosis under 20 C.F.R. § 727.203(a) available to miners with ten years of coal mine employment. In this regard the Director points out that a miner with ten years of coal mine employment in general has a broader opportunity for invocation of the presumption of total disability due to pneumoconiosis under 20 C.F.R. § 727.203(a) than under 20 C.F.R. § 410.490(b). The Director regards *Halon v. Director* and *Pittston v. Sebben* as applying solely when 20 C.F.R. § 410.490(b) gives a miner an evidentiary advantage over 20 C.F.R. § 727.203(a), that is when a claimant with fewer than ten years of coal mine employment can establish pneumoconiosis by X-ray, autopsy or biopsy evidence and can demonstrate through other evidence that a causal relationship exists between the pneumoconiosis and the coal mine employment. The Director further contends that in any event even under 20 C.F.R. § 410.490 the party opposing entitlement may produce evidence to establish that the disability did not arise out of coal mine employment. He asserts that a contrary ruling would violate Congressional intent, upset the statutory scheme and be inimical to the employer's due process rights.

Pauley regards this case as controlled by *Halon v. Director* and *Pittston v. Sebben*. He urges that it was the intention of Congress in 30 U.S.C. § 902(f)(2), as construed in those cases, "that a miner should have no more difficulty obtaining an award under Labor's rules than he or she would have under the Social Security rules." He asserts that this conclusion, if accepted, would preclude application of the rebuttal rules of 20 C.F.R. § 727.203(b) here as they would permit rebuttal even though 20 C.F.R. § 410.490(c) would not as it allows rebuttal only when there is evidence that the miner is doing his usual coal mine work or comparable and gainful work or is able to do so.

At the outset of our discussion of the merits of the case we point out two disturbing circumstances created by the decisions of the administrative law judge and the Board.

The first is that it is surely extraordinary that the findings of the administrative law judge, unchallenged on this appeal, that Pauley was totally disabled from returning to coal mining employment from causes unrelated to pneumoconiosis, which established that Bethenergy had, under 20 C.F.R. § 727.203(b)(3), rebutted the presumption of total disability due to pneumoconiosis invoked on Pauley's behalf under 20 C.F.R. § 727.203(a), precluded Bethenergy from rebutting the presumption under 20 C.F.R. § 410.490(c). That the findings had these dual consequences flows from the fact that the only methods of rebuttal which the administrative law judge, affirmed by the Benefits Review Board, recognized under 20 C.F.R. § 410.490(c) were that the miner is doing his usual coal mine work, or its equivalent, or is able to do so. Under the decisions of the administrative law judge and the Board this meant that Pauley both could and could not recover benefits under the Benefits Act, depending upon whether his claim was considered under the Health, Education and Welfare or Labor regulations. We find this to be a disquieting result and are reluctant to reach it. *Cf. Oravitz v. Director, Office of Workers' Compensation Programs*, 843 F.2d 738 (3d Cir. 1988) (medical evidence may not be used as the sole evidence under 20 C.F.R. § 727.203(b)(2) to rebut a presumption of total disability due to pneumoconiosis predicated on other medical evidence.)

While the foregoing anomaly might be tolerated, the second disturbing circumstance cannot be and it is outcome determinative. The purpose of the Benefits Act is to provide a recovery for a miner totally disabled at least in part by pneumoconiosis if the disability arises out of coal mine employment. 30 U.S.C. § 901(a); *Mullins v. Director*, 108 S.Ct. at 431. The administrative law judge made unchallenged findings with respect to matters legitimately

in issue under 20 C.F.R. § 727.203 which established that Pauley's disability did not arise even in part out of coal mine employment. Thus, even though the Benefits Act has a remedial purpose, *see Lukosevicz v. Director, Office of Workers' Compensation Programs*, No. 89-3359, slip op. at 10 (3d Cir. Nov. 7, 1989), it seems perfectly evident that no set of regulations under it may provide that a claimant who is statutorily barred from recovery may nevertheless recover.[7] *See Southeastern Community College v. Davis*, 442 U.S. 397, 411-12, 99 S.Ct. 2361, 2369-70 (1979).

We recognize, of course, that sometimes in judicial or administrative proceedings considerations extraneous to the merits of a claim or cause of action or to a defense may preclude a party from establishing its position and thus may permit an outcome not justified by the facts of a case. For example, a party may be precluded from asserting a claim, cause of action, or defense by estoppel, waiver, claim or issue preclusion, procedural default, or the statute of limitations. Furthermore, a party may be barred by evidentiary privileges from establishing the

[7] We point out that when Congress wants to make a presumption irrebuttable so as to establish entitlement it knows how to do so. An irrebuttable presumption of total disability arises under 30 C.F.R. § 921(c)(3) if the evidence shows that the miner has a complicated case of coal miner's pneumoconiosis as defined in the subsection. In that event a miner may receive benefits even if there is other evidence that the miner can do his usual coal mine work or other comparable and gainful work. *See Usery v. Turner Elkhorn*, 428 U.S. at 10-11, 96 S.Ct. at 2890. There is, however, no indication, that Congress had any intention to make the presumption invoked here on behalf of Pauley paramount over a showing by Bethenergy that Pauley did not qualify for benefits under the Benefits Act. We also observe that our result eliminates possible due process problems raised by the Director. *See id.* at 34-37, 96 S.Ct. at 2901-03.

underlying historical facts. But none of these considerations is applicable here as Bethenergy was free to establish its case and it did so. Accordingly, the only way in which we can affirm the Benefits Review Board is to hold that even though Bethenergy should, on the law and facts, have prevailed under the Benefits Act, by reason of the presumptions and limitations on rebuttal it must be responsible for benefits. We decline to reach such an unjust result.

In any event we conclude that the administrative law judge should not have considered Pauley's claim under 20 C.F.R. § 410.490. There is, of course, no dispute but that the claim was initially properly considered under 20 C.F.R. § 727.203. Reference was made to the Health, Education and Welfare standards by the administrative law judge because of our construction of 30 U.S.C. § 902(f)(2) in *Halon v. Director*. But *Halon v. Director*, was concerned with a claim for survivor's benefits in which the claimant produced X-ray and autopsy evidence that he had pneumoconiosis but was denied the benefit of the presumption in 20 C.F.R. § 727.203(a) because he had only eight years of coal mine employment. 713 F.2d at 23. We held that the limitation of the Labor presumption to long-term miners contravened 30 U.S.C. § 902(f)(2) because no such limitations exists under 20 C.F.R. § 410.490(b)(1)(i) which provides that any miner producing medical evidence satisfying the eligibility criteria is entitled to the presumption. 713 F.2d 31.

On rehearing we rejected the Director's argument that Congress in 30 U.S.C. § 902(f)(2) only intended to limit the Secretary of Labor's discretion in formulating medical eligibility criteria for its interim standards:

> [The Director] urge[s] that 30 U.S.C. § 902(f)(2) should be understood as if it read:
>
> > *Medical* criteria applied by the Secretary of Labor in case of [adjudications pursuant to 30 U.S.C. § 945] shall not be more restrictive than the *medical* criteria applicable to a claim filed on June 30, 1973 . . .
>
> This reading obviously would permit the application of 20 C.F.R. § 727.203, and thereby deny claimants who establish less than ten years of coal mine employment the benefit of the rebuttable presumption of the cause of disability. The plain language of the statute does not suggest that Congress intended any such modification of the generic term, 'criteria.'

713 F.2d at 24 (emphasis in original) (citations omitted).

Accordingly, we concluded that the word "criteria" in 30 U.S.C. § 902(f)(2) refers to adjudicatory as well as medical eligibility criteria. Therefore, we remanded the case for consideration under the Health, Education and Welfare standards. Thus, it is evident, that *Halon v. Director* was concerned with the invocation of the presumption of total disability due to pneumoconiosis and not with its rebuttal and is not support for the result reached by administrative law judge or the Board.

We recognize that, in the time between the adjudications by the administrative law judge and the Benefits Review Board, *Pittston v. Sebben*, on which the Board relied, was decided. In *Pittston* the Supreme Court agreed with *Halon v. Director* that the presumption at 20 C.F.R. § 727.203(a), insofar as it requires miners to establish at least ten years of coal mine employment before they can invoke the presumption of total disability from pneumoconiosis through X-ray, autopsy or biopsy evidence, conflicts with 30 U.S.C. § 902(f)(2). 109 S.Ct. at 420. The

Court, however, acknowledged that there might be merit in the argument advanced by the Secretary of Labor that criteria within 30 U.S.C. § 902(f)(2) means total disability criteria, even though that would include more than medical criteria. 109 S.Ct. at 420. But the Court held that even if criteria was limited to total disability criteria, 20 C.F.R. § 727.203(a), by its prerequisite of ten years coal mine employment for invocation of the presumption, necessarily increases the requirements for the presumption of total disability and thus applies more restrictive total disability criteria than those in 20 C.F.R. § 410.490. 109 S.Ct. at 420.

Nevertheless, the Court was clearly not dealing with the rebuttal provisions for it indicated that:

> Finally, the Secretary focuses on the interim Labor regulation's additional rebuttal provisions, which permit the introduction of evidence disputing both the presence of pneumoconiosis and the connection between total disability and coal mine employment. Respondents have conceded the validity of these provisions, even though they permit rebuttal of more elements of statutory entitlement than did the interim HEW regulation. The Secretary argues that there is no basis for drawing a line that permits alteration of the rebuttal provisions, but not the affirmative factors addressed by the Secretary. That may or may not be so, but it does not affect our determination regarding the affirmative factors, for which it seems to us the statutory requirements are clear. Respondents' concession on the rebuttal provisions means that we are not required to decide the question of their validity, not that we must reconcile their putative validity with our decision today.

109 S.Ct. at 422-23.

Accordingly, *Pittston v. Sebben* is no more controlling on the issues now before us than is *Halon v. Director.*

In fact, the positioning in 30 U.S.C. § 902(f), which deals with "total disability", of the requirement that the criteria applied by the Secretary of Labor be not more restrictive than the criteria applicable to a claim filed on June 30, 1973, indicates that the rebuttal criteria are not limited by 30 U.S.C. § 902(f)(2). We think that if Congress had intended "criteria" under 30 U.S.C. § 902(f)(2) to include rebuttal criteria or criteria relating to matters other than those dealing with "total disability" it would have said so directly rather than dealing with the matter diffidently in the section. Therefore, the administrative law judge should not have applied 20 C.F.R. § 410.490 and Pauley was barred from recovery by 20 C.F.R. § 727.203(b)(3).

We also point out that even if we applied the rebuttal provisions of 20 C.F.R. § 410.490(c), our result would not be changed as both (c)(1) and (c)(2) make reference to 20 C.F.R. § 410.412(a)(1) which refers to a miner being "totally disabled due to pneumoconiosis." While the Director in his brief indicates that there is no case law indicating how the rebuttal provisions of 20 C.F.R. § 410.490 were applied by the Department of Health, Education and Welfare, we cannot understand why the reference was made to 20 C.F.R. § 410.412(a)(1) unless it was the intention of the Secretary to permit rebuttal by a showing that the claimant's disability did not arise at least in part from coal mine employment. *See Solomons, A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of its Unresolved Issues,* 83 W. Va. L. Rev. 869, 880 (1981).[8] Additionally,

[8] In his brief Pauley, without citation of authority, sets forth that "[t]he Social Security Administration has uniformly applied [20 C.F.R. § 410.490] so that the presumption is irrebuttable." While this representation may not be consistent with that of the Direc-

(Footnote continued on following page)

as we have already noted, such a construction is surely required to carry out the purpose of the Benefits Act.

In reaching our conclusion we have not overlooked *Sulyma v. Director, Office of Workers' Compensation Programs*, 827 F.2d 922 (3d Cir. 1987), cited by the administrative law judge, for the proposition that 20 C.F.R. § 410.490(c) "does not allow for rebuttal of the presumption by showing that the claimant's total disability is unrelated to his coal mine employment." To start with he should not have decided this matter under 20 C.F.R. § 410.490, the regulations involved in *Suylma v. Director*. Furthermore he misconstrued our opinion. In that case the parties by stipulation and concessions limited the appeal so that the only issue before us was whether the medical evidence in the record was sufficient under 20 C.F.R. § 410.490(c)(2) to rebut the presumption of total disability due to pneumoconiosis to which the miner was agreed to be entitled under 20 C.F.R. § 410.490(b). We only held that it was not as there was no evidence that the miner, who had not been gainfully employed for about ten years, could perform his usual coal mine work or comparable and gainful work and thus was not disabled. This conclusion was easily reached as one report indicated that the miner was completely disabled due to black lung disease and the other,

[8] *continued*
tor, even if we accepted it our result would not be changed as we do not agree that the presumption is irrebuttable if the disability does not arise even in part out of coal mine employment. We, of course, need not defer to an agency's interpretation of its regulations if it is plainly erroneous or inconsistent with the regulation. *Bonessa v. United States Steel Corp.*, 884 F.2d at 732. Furthermore, our construction of 20 C.F.R. § 410.490(c) is an alternate basis for our result.

though disputing that conclusion, was devoid of any reference as to whether or not the miner could perform his usual coal mine work or comparable and gainful work. Thus, we concluded that there was an "absence of rebuttal evidence to satisfy 20 C.F.R. § 410.490(c)." Accordingly, in our very narrow opinion we had no occasion to deal with the interplay between the rebuttal provisions of 20 C.F.R. § 727.203(b) and 20 C.F.R. § 410.490(c).

In any event, contrary to the view of the administrative law judge, we did not hold in *Sulyma v. Director* that 20 C.F.R. § 410.490(c) does not allow for rebuttal of the presumption of total disability due to pneumoconiosis by a showing that the claimant's total disability was unrelated to his coal mine employment. That issue was just not presented to us and we decided the case on the basis framed by the parties. We certainly will not interpolate from *Sulyma* and speculate on what we might have held if different questions had been presented. The fact is that the administrative law judge construed the case to have a meaning far beyond our holding.

We are aware that there is an apparent conflict between other circuits as to issues similar to those before us. *Compare Youghiogheny and Ohio Coal Company v. Milliken*, 866 F.2d 195 (6th Cir. 1989), *with Taylor v. Peabody Coal Co.*, No. 86-2590 (7th Cir. Aug. 28, 1989). The facts in those cases were, of course, somewhat different than those here. But we will not, however, attempt to harmonize those cases as the result we reach seems inexorable on the facts of this case.

In view of the aforesaid we will grant Bethenergy's petition for review and will set aside the order of the Benefits Review Board of March 28, 1989, and will remand the case for entry of an order denying benefits.

APPENDIX B

U.S. Department of Labor

Benefits Review Board
1111 20th St., N.W.
Washington, D.C. 20036

BRB No. 88-2565 BLA
OWCP No. 187-14-5737

JOHN PAULEY
Claimant-Respondent

v.

BETH ENERGY MINES, INCORPORATED
Employer-Petitioner

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Party-in-Interest

FILED AS PART OF THE RECORD

28 MAR 1989
Linda M. Meekins
Clerk
Benefit Review Board

DECISION and ORDER

Appeal of the Decision and Order and Order Denying Motion for Reconsideration of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Daniel G. Walter (Pawlowski, Creany & Tulowitzki), Ebensburg, Pennsylvania, for claimant.

John J. Bagnato (Spence, Custor, Saylor, Wolfe & Rose), Johnstown, Pennsylvania, for employer.

Before: SMITH, Acting Chief Administrative Appeals Judge, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and Order Denying Motion for Reconsideration (85-BLA-2137) of Administrative Law Judge Daniel L. Leland awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge found invocation of the interim presumption established under 20 C.F.R. §727.203(a)(1), but found rebuttal thereof established under 20 C.F.R. §727.203(b)(3). The administrative law judge further found that entitlement was not established under 20 C.F.R. Part 718, but found invocation established under 20 C.F.R. §410.490(b)(1)(i), (2), and found that employer failed to establish rebuttal thereof under Section 410.490(c). Consequently, benefits were awarded. The administrative law judge re-affirmed his application of Section 410.490 in his Order Denying Motion for Reconsideration. On appeal, employer argues that the administrative law judge exceeded his authority in declining to apply *Whiteman v. Boyle Land and Fuel Coal Co.*, 11 BLR 1-99 (1988) (*en banc*) (Brown & McGranery, JJ., dissenting), which held Section 410.490 inapplicable to claims filed under Part C of the Act, as is the instant claim. Claimant responds that the administrative law judge properly applied Section 410.490. Employer replies that the decision of the United States Supreme Court in *Sebben v. Pittston Coal Group*, 109 S.Ct. 414 (1988), which was issued subsequent to the filing of employer's Petition for Review herein, did not overrule *Whiteman*, *supra*,

and thus does not require application of Section 410.490 herein.[1]

In view of the decision of the United States Supreme Court in *Sebben, supra*, we reject employer's argument that the administrative law judge erred in applying Section 410.490 herein. Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed. *See* 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

SO ORDERED.

/s/ ROY P. SMITH
ROY P. SMITH, Acting Chief
Administrative Appeals Judge

/s/ NANCY S. DOLDER
NANCY S. DOLDER
Administrative Appeals Judge

/s/ REGINA C. MCGRANERY
REGINA C. McGRANERY
Administrative Appeals Judge

[1] Inasmuch as this case was advanced on the Board's docket for expedited review, the Board prohibited the filing of reply briefs herein. *Pauley v. Beth Energy Mines, Inc.*, BRB No. 88-2565 BLA (Dec. 13, 1988) (unpublished). Nevertheless, since no prejudice to claimant results, we accept employer's Reply Brief based on the intervening issuance of the United States Supreme Court's decision in *Sebben, supra*. *See generally* Fed. R. App. Proc. 28(j).

Dated this 28th
day of March 1989

APPENDIX C

U.S. Department of Labor
Office of Administrative Law Judges
Seven Parkway Center
Pittsburgh, Pennsylvania 15220

In the Matter of		
JOHN PAULEY	Claimant	DATE ISSUED: May 3, 1988
v.		
BETHLEHEM MINES CORPORATION	Employer	CASE NO. 85-BLA-2137
and		
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,	Party In Interest	OWCP NO. GR 187-14-5737

Daniel G. Walter, Esquire
For the Claimant

Ralph Trofino, Esquire
For the Employer

Before: DANIEL L. LELAND
Administrative Law Judge

DECISION AND ORDER – AWARDING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §901 *et seq.* In

accordance with the Act, and the pertinent regulations, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a formal hearing.

Benefits under the Act are awardable to persons who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of persons who were so totally disabled at the time of their death or whose death was caused by pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising from coal mine employment and is commonly known as black lung.

A formal hearing was held in Pittsburgh, Pennsylvania, on November 5, 1987, at which all parties were afforded full opportunity to present evidence and argument, as provided in the Act and the regulations found in Title 20 of the Code of Federal Regulations. Regulation Section numbers mentioned in this Decision and Order refer to sections of that Title.

ISSUES

I. Is the miner totally disabled?

II. Is the miner's total disability due to pneumoconiosis?

FINDINGS OF FACT AND CONCLUSIONS OF LAW [1]

John Pauley was born on July 25, 1922, and married his wife, Harriet, on August 29, 1944. (DX 1, 10). He filed

[1] The following abbreviations have been used in this opinion: DX = Director's exhibit, CX = claimant's exhibit, EX = employer's exhibit, TR = hearing transcript, BCR = board certified radiologist, B = B reader.

a claim for black lung benefits on April 21, 1978 (DX 1), and was initially found entitled to benefits on October 27, 1981. (DX 19). Mr. Pauley asserted that he worked 34 years in the mines, all underground, at various jobs including timberman, roof bolter, and piner operator. (TR 13). The employment records of Bethlehem Mines Corp., Island Creek Coal Co., Berwind Corp., Johnstown Coal and Coke Co., and Eastern Associated Coal Corp., verify that claimant had 30 years of coal mine employment. (DX 5, 6, 7, 8 & 9). The employer has stipulated to 30 years of coal mine employment, (TR 5), and I will credit claimant with that number of years worked in the mines.

The claimant's last day of coal mine work was August 2, 1978. (TR 10). His last job, which he held for four or five years, was as a mine examiner or "fire boss." (*Id.*). The claimant testified that he stopped working and went on sick leave due to shortness of breath, coughing and fatigue, which had begun in 1974 and had been gradually worsening. (*Id.*). Claimant's job as a mine examiner involved walking along the belts six to eight miles a day, with some crawling required. (TR 12).

Mr. Pauley stated that he experiences shortness of breath when walking distances and climbing stairs, and that he is unable to lift anything. (TR 15). Claimant no longer does any work around the house, and had to give up hunting. (TR 20, 21). He has trouble breathing when he is outside, and his sleep is disturbed by coughing and wheezing which is also present during the morning hours. (TR 21, 22). Mr. Pauley has arthritis and walks with a cane. (TR 15). He has been taking Breathine since 1976 or 1977, and takes several medications daily for arthritis. (TR 17, 18, 19). Claimant had a stroke in January, 1987 and required hospitalization. (TR 19). Claimant smoked cigarettes for 34

years, stopping in 1974, at the rate of one pack every three days; he still uses chewing tobacco. (TR 14). He currently receives Social Security Disability Income as well as a state award of black lung benefits. (TR 22).

Medical Evidence

Chest X-rays

Date of X-ray	Physician	Interpretation
1/8/75 (DX 15)	France (BCR)	Opacities compatible with pneumoconiosis
9/21/78 (DX 14)	Klemens	2/2, t
9/21/78 (DX 13)	Cole (B, BCR)	2/2 q, s
12/29/78 (DX 18)	Gress	1/1, p
12/16/82 (DX 22)	Klemens	2/3 q, t
5/6/85 (EX 1)	Bradley	1/1 q, t
12/10/86 (EX 3)	Lantos	2/1 q, r
1/21/87 (CX 1)	Srivastava	2/2 q, s
1/21/87 (CX 2)	Mathur (B, BCR)	2/3 q, u
9/16/87 (CX 3)	Wolfe (B, BCR)	1/2 r, u
9/24/87 (EX 6)	King (B, BCR)	2/1 q, q

Pulmonary Function Studies

Date	Height	FEV_1	MVV
9/21/78 (DX 11)	69"	2.8	63
12/29/78 (DX 18)	68"	3.4	89
12/16/82 (DX 22)	68-1/2"	2.8	67
5/6/85 (EX 1)	66-1/2"	2.9	66
12/10/86 (EX 3)	66"	2.98	108
1/21/87 (CX 1)	66"	2.52 2.58	14 9[2]
9/16/87 (CX 3)	68"	2.39 2.16	54.80 42.08[2]
9/24/87 (EX 6)	64"	2.50 2.59	59 67[2]

Dr. Robert G. Pickerill reviewed the pulmonary function studies performed on September 16, 1987 by Dr. Bernard P. McQuillan. (EX 4). Dr. Pickerill's inspection on the tracings indicated that the FEV_1 result is unreliable because of excessive hesitation at the start of expiration. He further concluded that the MVV value is inconsistent with the other values and is, therefore, also invalid. Drs. Gregory J. Fino and George W. Strother submitted reports which are in agreement with Dr. Pickerill as to the invalidity of this pulmonary function study. (EX 5, 7). All three of these physicians are board certified in pulmonary disease, so that their assessments are entitled to be highly cred-

[2] Post-bronchodilators

ited. Dr. Pickerill also reviewed all of the pulmonary function data and determined that all of the MVV results are invalid except the normal MVV result of December 10, 1986, because of sub-optimal respiratory rates of less than 60 breaths per minute. (EX 6 at 6). In addition, Dr. Pickerill found that the FVC results were sub-optimal, with the exception of those obtained in 1985 and 1986, because of premature termination of expiration. (*Id.*)

Blood Gas Studies

Date	PCO_2	PO_2
5/6/85 (EX 1)	38	87
12/10/86 (EX 3)	32.1 32	92.7 85.8[3]

Hospital Records

The claimant was admitted to Mercy Hospital on three occasions during 1985. (EX 2). He was first admitted on March 28, 1985 with symptoms of active arthritis and pain, and was discharged on April 4, 1985 following appropriate treatment. The final diagnosis of Dr. G. Chandran was 1) active rheumatoid arthritis and 2) hematuria.

The claimant was again admitted on April 25, 1985 with complaints of upper abdominal pain. (*Id.*) Dr. Chandran again diagnosed 1) active rheumatoid arthritis, and 2) hematuria, as well as 3) gastritis.

Subsequently, on October 16, 1985, claimant was admitted to Mercy Hospital for treatment of his arthritis. The

[3] Post-exercise

final diagnosis was: 1) refractory rheumatoid arthritis, 2) microscopic hematuria, and 3) pneumoconiosis. A report of a chest x-ray performed at Mercy Hospital indicates extensive involvement throughout the chest with pneumoconiosis superimposed or associated with chronic obstructive pulmonary disease. (EX 2).

Claimant was admitted to Lee Hospital on January 27, 1987 following a stroke. He was discharged on February 4, 1987 with the following diagnoses: 1) left-sided cerebrovascular accident, 2) severe rheumatoid arthritis, 3) normocytic, normochromic anemia. (EX 8).

On March 9, 1987, the claimant was admitted to Lee Hospital for an aortic arch angiogram. The final diagnoses upon discharge on March 11, 1987 were 1) recent cerebrovascular accident with atherosclerotic plaques of the carotid arteries, 2) hypertension, 3) rheumatoid arthritis, 4) pneumoconiosis. (EX 8).

Physicians' Reports

Dr. Robert Klemens examined the claimant on September 21, 1978, and completed a Department of Labor Form CM-988 based on his evaluation. (DX 12). On physical examination, Dr. Klemens found that claimant's chest was emphysematous. He diagnosed coal workers' pneumoconiosis by x-ray as 2/2, t. Dr. Klemens noted that claimant was still working in the mines at the time of his examination, but he indicated that he was having difficulty performing his job. (*Id.*)

Claimant was examined by Dr. Gordon A. Gress on December 29, 1978. (DX 18). His evaluation included a physical, an electrocardiogram, chest x-ray and pulmonary function study. Dr. Gress stated that claimant was unable to complete an exercise test due to shortness of breath. Al-

though he admitted that there was x-ray evidence of simple pneumoconiosis, Dr. Gress was impressed by the pulmonary function test results which he opined were well within normal limits. He was therefore unable to find any degree of disability.

Dr. Klemens examined claimant a second time on December 16, 1982. (DX 22). In addition to a physical examination, Dr. Klemens performed a pulmonary function study and had a chest x-ray taken. He again diagnosed coal workers' pneumoconiosis, which had become totally disabling. He noted that the claimant can be expected to have increasing difficulties with his breathing with the passing of time. Dr. Klemens also reported that claimant was taking Breathine tablets which improved his condition somewhat. (*Id.*)

Dr. Samuel Bradley examined the claimant on May 6, 1985. (EX 1). His physical examination included a chest x-ray, pulmonary function study, blood gas test, and electrocardiogram. He stated that the pulmonary function study results did not show a restrictive or obstructive defect, that the blood gases were normal, and that the x-ray was positive for pneumoconiosis. His overall impressions of the claimant's condition were:

1. Coal workers' pneumoconiosis, 1/1, q, t, em-all 6 zones.
2. Hypertension.
3. Mixed arthritis-primarily rheumatoid arthritis and degenerative arthritis.
4. Benign prostatic hypertrophy (by history).
5. S/P hematuria: probably secondary to trabeclated urinary bladder.
6. Possible carpal tunnel syndrome (by history).
7. Osteopenia (osteoporosis by previous x-rays).

With regard to total disability, Dr. Bradley concluded that, clinically, claimant still ventilates well and is not pulmonarily impaired. Despite the x-ray evidence, Dr. Bradley found that claimant is neither partially nor totally disabled from coal workers' pneumoconiosis. (*Id.*)

Dr. Gordon Gress was deposed on July 16, 1986. (EX 9). He had the opportunity to review claimant's medical records and test results which were developed subsequent to his 1978 examination. When asked to rate the level of exertion required by claimant's last coal mine job, Dr. Gress stated that it was mild to moderate. (EX 9 at 8, 9). Dr. Gress maintained that he found no evidence of pulmonary disability. (EX 9 at 10, 11). It was his opinion that claimant could return to work from a pulmonary standpoint, and nothing in the reports he reviewed influenced him to alter that opinion. (EX 9 at 14).

A deposition of Dr. Bradley was taken on July 31, 1986. (EX 10). He also had reviewed all of claimant's medical records to date. Dr. Bradley was asked to classify claimant's smoking history, and he replied that he thought claimant had some residual damage from cigarette smoking which probably caused some obstructive airways disease and was probably responsible in part for his emphysema. (EX 10 at 9). Dr. Bradley restated his conclusion that claimant had no significant pulmonary impairment, and could return to work. (EX 10 at 12). Dr. Bradley noted that in the overwhelming majority of cases, pulmonary disease affects ventilation which shows up in the pulmonary function studies. (EX 10 at 16, 17). However, in this case he was unable to objectively document claimant's subjective complaints of shortness of breath. (EX 10 at 20). On cross-examination, Dr. Bradley did admit that he could not rule out entirely any contribution of coal dust and silica inhalation to claimant's emphysema, which contributes in some

degree to claimant's overall impairment caused principally by his arthritis. (EX 10 at 19-21).

Raymond J. Lantos, M.D. examined the claimant on December 10, 1986. (EX 3). His physical examination included a chest x-ray, a pulmonary function study, an arterial blood gas study, and an electrocardiogram. He read the x-ray to show simple pneumoconiosis, and he found that the pulmonary function and resting blood gas tests were normal, and the decrease in PO_2 after exercise was still within normal limits. Dr. Lantos' clinical impressions were:

1. pulmonary emphysema—marked.
2. pneumoconiosis—simple, 2/1, q, 6 zones.
3. rheumatoid arthritis—on therapy.

He concluded that claimant is totally industrially disabled as a result of arthritis, but is not disabled as a result of pulmonary disease. (*Id.*)

Dr. Sheonath P. Srivastava examined the claimant on January 21, 1987. (CX 1). He performed a pulmonary function study, which he found to be within normal limits, as well as a normal electrocardiogram. Dr. Srivastava read claimant's chest x-ray as 2/2, q, s. He diagnosed coal workers' pneumoconiosis and rheumatoid arthritis. He determined that the claimant's condition was gradually deteriorating, and that he is totally and permanently disabled from pneumoconiosis resulting from coal mine employment. (*Id.*)

Bernard P. McQuillan, M.D., examined the claimant on September 16, 1987. (CX 3). With regard to a pulmonary function study performed as part of his evaluation, Dr. McQuillan noted mild obstructive lung disease based on the FVC and FEV_1 values, and moderate obstructive lung disease based on the MVV. He read a chest x-ray as 1/2, r, u. Dr. McQuillan's final diagnosis was:

1) Pneumoconiosis
   a. Chronic bronchitis
   b. Obstructive pulmonary emphysema
   c. Left lower lobe emphysematous blood
   d. Chronic respiratory insufficiency
2) Essential hypertension, moderately severe
3) Rheumatoid arthritis, classical, active
4) Chronic cerebral atherosclerosis
   a. Old cerebral thrombosis
   b. Mild residual hemiparesis

Dr. McQuillan concluded that claimant is unable to return to work from a strictly pulmonary standpoint. His rationale for that conclusion included a number of factors, most notably claimant's shortness of breath on exertion, chronic cough, pulmonary function results, difficulty walking prolonged distances, elevated blood pressure and chronic rheumatoid arthritis. (*Id.*)

Dr. Robert G. Pickerill examined the claimant on October 5, 1987. (EX 6). In addition to conducting his own pulmonary function study and x-ray, Dr. Pickerill reviewed all of the medical records and objective tests results pertaining to claimant's pulmonary condition. His diagnosis was:

1. Simple coal workers' pneumoconiosis (category 2).
2. Severe chronic rheumatoid arthritis.
3. Chronic bronchitis based upon subjective symptoms of chronic productive cough.
4. Mild pulmonary emphysema based upon hyperinflation of the lungs and emphysematous blebs by chest x-ray and minor abnormalities on pulmonary function testing.
5. Stroke with residual right hemiparesis in January 1987.

Dr. Pickerill opined that claimant's chronic bronchitis and mild pulmonary emphysema is most likely related to his cigarette smoking history and not to occupational lung disease. As to disability, Dr. Pickerill determined, based on the objective tests results and physical examination, that claimant has sufficient pulmonary capacity to perform his coal mine work from a respiratory standpoint. He went on to state that although claimant is totally and permanently disabled due to arthritis, his coal workers' pneumoconiosis and pulmonary emphysema are not disabling. (*Id.*)

Dr. Lantos was deposed on October 19, 1987. (EX 11). He reiterated his conclusions as stated in his earlier report, and more fully explained the basis of these conclusions. Dr. Lantos indicated that the emphysema found on physical examination was generalized and idiopathic in nature, rather than focal emphysema which is seen with pneumoconiosis. (EX 11 at 13). He noted that cigarette smoking is a significant factor in this type of emphysema. (*Id.*) Dr. Lantos further opined that the post-exercise decrease in blood gases was likely the result of generalized emphysema. (EX 11 at 15). He went on to state, however, that he could not attribute a lot of claimant's symptoms to smoking, in that coal dust exposure was a more significant factor affecting his lungs. (*Id.* at 16). With regard to claimant's disability, Dr. Lantos maintained that it is the result of arthritis, with the effects of his stroke as a significant contributory factor. (*Id.* at 25). He specifically refused to attribute claimant's disability to his occupationally acquired pulmonary disease, but admitted that it may be a detrimental aspect of his overall condition. (*Id.*)

The deposition of Dr. McQuillan was taken on November 10, 1987. (CX 4). Dr. McQuillan testified that from a strictly pulmonary viewpoint, aside from his other medi-

cal problems, claimant is disabled from returning to coal mine employment. (CX 4 at 14). He based that conclusion on claimant's significant silica and dust exposure over many years as an underground miner, as manifested by his chest x-ray, and the obstructive component, which could be related to pneumoconiosis or to cigarette smoking. (*Id.* at 15). Dr. McQuillan added, however, that claimant's smoking history was rather light and rather remote. (*Id.*) He stated that his opinion was formulated solely on his examination with a review of the laboratory data contained in his report. (*Id.* at 17).

Entitlement Under Part 727

The miner's claim was filed before April 1, 1980 and must be evaluated under the Part 727 regulations. §§727.2, 718.2. Section 727.203(a) contains an interim presumption which provides that a miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis arising out of that employment, if one of the following medical requirements is met: (1) a chest x-ray, biopsy, or autopsy establishes the existence of pneumoconiosis, (2) ventilatory studies establish the presence of a chronic respiratory or pulmonary impairment as demonstrated by certain qualifying values, (3) blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by certain qualifying values, or (4) other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment. A fifth method of invocation applies only in the case of deceased miners where no medical evidence is available. See §727.203(a)(5).

The Supreme Court of the United States recently held that the Section 727.203(a) presumption requires the claimant to establish at least one of the qualifying facts by a preponderance of the evidence. *Mullins Coal Co. v. Director, OWCP*, 108 S.Ct. 427 (1987). In the present case, by not contesting the issue of pneumoconiosis and causal relationship, the employer has conceded the presence of coal workers' pneumoconiosis. (TR 4). Consequently, I find that the interim presumption is invoked at (a)(1).

The interim presumption shall be rebutted pursuant to §727.203(b) by evidence that (1) the miner is doing his usual coal mine work or comparable and gainful work, (2) the miner is able to do his usual coal mine work or comparable and gainful work, (3) the total disability of the miner did not arise in whole or in part out of coal mine employment, or (4) the miner does not have pneumoconiosis.

As the claimant has not worked since August 2, 1978, rebuttal is precluded at (b)(1). Rebuttal at (b)(2) is available if in light of all relevant evidence it is established that the miner is able to do his usual coal mine work or comparable and gainful work. *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986). Claimant has several medical problems, including severe arthritis, residual hemiparesis as the result of a stroke, and pulmonary disease. Although not all of the physicians agree as to the cause or causes of claimant's total disability, the most recent medical evidence, supported by claimant's credible testimony, clearly establishes that claimant is totally disabled from returning to coal mine employment. Therefore, the presumption is not rebutted at (b)(2).

The party opposing entitlement may also rebut the interim presumption pursuant to §727.203(b)(3) if "the evidence establishes that the miner's total disability does not

arise in whole or in part out of coal mine employment." The Court of Appeals for the Third Circuit has held that rebuttal under (b)(3) requires a finding that pneumoconiosis does not contribute even in part to claimant's total disability. *Carozza v. United States Steel Corp.*, 727 F.2d 74, 6 BLR 2-15 (3d Cir. 1984). There is disagreement among the physicians who evaluated claimant on the issue of whether pneumoconiosis contributed to his total disability. Dr. Gress failed to find any evidence of pulmonary disability. Dr. Bradley, who examined the claimant more than six years later, similarly found that he was not pulmonarily impaired. Dr. Bradley's opinion was based on a complete physical examination and testing which yielded normal results. In his deposition, Dr. Bradley explained that he was unable to objectively document claimant's reported respiratory symptoms. (EX 10 at 20). Dr. Lantos also conducted comprehensive testing and concluded that although the claimant is totally industrially disabled due to arthritis, he is not disabled as a result of pulmonary disease. Finally, Dr. Pickerill, who reviewed all of the test results and reports of the other physicians as well as performing his own tests, determined that claimant has sufficient pulmonary capacity to perform his coal mine work. Dr. Pickerill agreed with Dr. Lantos that claimant is totally and permanently disabled due to arthritis, but that his pneumoconiosis and emphysema are not disabling. In view of the fact that Dr. Pickerill is board certified in pulmonary diseases and that his report was especially well documented and reasoned, I am inclined to give his opinion a great deal of weight. When considered together with the concurring opinions of Drs. Gress, Bradley and Lantos, as well as the objective evidence, I find that it sufficiently outweighs the contradictory opinions so as to establish (b)(3) rebuttal.

While Drs. Klemens and Srivastava both found claimant totally disabled due to pneumoconiosis, neither provided a well reasoned basis for such a conclusion, especially in light of their failure to reconcile the normal objective test results. Although Dr. McQuillan's report finding total pulmonary disability was better reasoned, it relied in large part on completely invalid pulmonary function study results. Additionally, in his list of factors supporting his conclusion that claimant is totally disabled from a pulmonary standpoint, Dr. McQuillan included several conditions which are not related to pulmonary disease. Moreover, Dr. McQuillan was unable to state whether claimant's pulmonary disability was the result of coal dust exposure or cigarette smoking. (CX 4 at 15). Unlike Dr. Pickerill, Dr. McQuillan did not consider all of the available medical data in forming his opinion. As the employer has sustained its burden of establishing that pneumoconiosis is not a contributing factor in claimant's disability, it has succeeded in rebutting the presumption at §727.203(b)(3). Therefore, the claim must be denied under Part 727.

Entitlement Under Part 718

Since the claimant has failed to qualify for benefits under Part 727, his eligibility must also be determined pursuant to the regulations at Part 718. *Caprini v. Director, OWCP*, 10 BLR 2-180 (3d Cir. 1987). To be found entitled to benefits, the claimant must show that he is totally disabled due to pneumoconiosis arising out of coal mine employment. §§718.202, 718.203, 718.204. As discussed above in the section on §727.203(b)(3) rebuttal, the evidence of record fails to support a finding of total disability due to pneumoconiosis. The claimant, therefore, is not entitled to benefits under the Part 718 regulations.

Entitlement Under §410.490

As this case arises with the jurisdiction of the United States Court of Appeals for the Third Circuit, application of 20 C.F.R. §410.490 to this claim must be raised *sua sponte* when a claim has been denied pursuant to 20 C.F.R. §727. *Halon v. Director, OWCP*, 713 F.2d 30, 5 BLR 2-20 (3d Cir. 1982), *aff'd on rehearing*, 713 F.2d 21 (3d Cir. 1983).

Section 410.490 provides that a miner will be presumed to be totally disabled due to pneumoconiosis if a chest x-ray, biopsy or autopsy establishes the existence of pneumoconiosis or, in the case of a miner employed for at least 15 years in underground or comparable coal mine employment, ventilatory studies establish the presence of a chronic respiratory or pulmonary disease as demonstrated by values which are equal to values specified at §410.490 (b)(1)(ii), and the impairment arose out of coal mine employment.

Since the presence of pneumoconiosis arising out of coal mine employment has been conceded by the employer, the §410.490 presumption is invoked.

Section 410.490(c) provides only two methods of rebuttal: (1) there is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work; or (2) evidence establishes that the individual is able to do his usual coal mine work or comparable work. Claimant has not worked since August 2, 1978, and rebuttal under subsection (c)(1) is precluded. As to (c)(2), the claimant is clearly disabled from performing his usual coal mine work or comparable work as a result of his arthritis and residual hemiparesis. There is no evidence that claimant is able to work in light of these conditions. Unlike §727.203(b), §410.490(c) does not allow for rebuttal of the presump-

tion by showing that the claimant's total disability is unrelated to his coal mine employment. *See Sulyma v. Director, OWCP*, 10 BLR 2-275 (3d Cir. 1987). The presumption of §410.490(b) has not been rebutted. Therefore, the claimant is entitled to benefits.

Onset Date

As the onset of decedent's total disability is not clear from the record, claimant is entitled to benefits beginning April 1, 1978, the first day of the month in which he filed his Part C claim. §725.503(b).

Attorney Fees

No award of attorney's fees for services to claimant is made since no application has been received. Thirty days is hereby allowed to claimant's counsel for the submission of such an application and his attention is directed to §§725.365 and 366 of the regulations. A service sheet showing that service has been made upon all parties including claimant must accompany the application. Parties have 10 days following receipt of any such application within which to file any objections. The Act prohibits the charging of a fee in the absence of an approved application.

ORDER

The Bethlehem Mines Corporation is ordered to:

1. pay to claimant all benefits to which he is entitled under the Act, augmented by reason of his dependent spouse, commencing as of April 1, 1978.[4]

[4] This amount is to be offset, as appropriate, by the benefits paid to claimant for disability due to pneumoconiosis pursuant to state law.

2. pay to claimant all medical and hospitalization benefits to which he is entitled commencing as of April 1, 1978.

3. reimburse the Secretary of Labor for any payments under the Act he has made to claimant and to deduct such amounts, as appropriate, from the amounts it is ordered to pay under paragraphs 1 and 2 above.

4. pay to claimant or to the Secretary of Labor, as appropriate, interest at the lawful rate from the date thirty days after the initial determination of liability by the Deputy Commissioner.

/s/ DANIEL L. LELAND
DANIEL L. LELAND
Administrative Law Judge

DLL/bl

NOTICE OF APPEAL RIGHTS. Pursuant to 20 C.F.R. §725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this decision by filing a notice of appeal with the Benefits Review Board, 1111 20th Street, N.W., Suite 757, Washington, D.C. 20036.

APPENDIX D

[DATED FEBRUARY 6, 1990]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-3364

BETHENERGY MINES INC.,

Petitioner

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondent

(BRB No. 88-2565 BLA)

SUR PETITION FOR REHEARING

PRESENT: HIGGINBOTHAM, *Chief Judge*, and SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, *Circuit Judges*, and GAWTHROP, *District Judge**

* Honorable Robert S. Gawthrop, III, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

The petition for rehearing filed by respondent John C. Pauley in the above captioned matter together with the brief of the Chicago Area Black Lung Association as amicus curiae, having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judge Hutchinson would grant rehearing by the court in banc.

BY THE COURT:

/s/ _____
Circuit Judge

Dated: Feb 6 1990

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-3364

BETHENERGY MINES INC.,
Petitioner

vs.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondent

and

JOHN C. PAULEY,
Respondent

(BENEFITS REVIEW BOARD No. 88-2565 BLA)
ON PETITION FOR REVIEW OF AN ORDER OF
THE BENEFITS REVIEW BOARD
OF THE UNITED STATES DEPARTMENT OF LABOR

Present: MANSMANN and GREENBERG, *Circuit Judges* and GAWTHROP, *District Judge.**

JUDGMENT

This cause came on to be heard on the record from the Benefits Review Board and was argued by counsel November 8, 1989.

* Honorable Robert S. Gawthrop, III, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

On consideration whereof, it is now here ordered and adjudged by this Court that the petition for review of the decision and order of the said Board dated March 28, 1989, be, and the same is hereby granted and the March 28, 1989, order set aside and the cause is remanded for entry of an order denying benefits. Costs taxed against the respondent. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ SALLY MRVOS
Clerk

December 7, 1989

Certified as a true copy and issued in lieu of a formal mandate on February 14, 1990.

Teste: M.E. Ferguson

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit

APPENDIX F

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 402(f) of the Black Lung Benefits Act, 30 U.S.C. § 902(f)

(1) The term "total disability" has the meaning given it by regulations of the Secretary of Health and Human Services for claims under part B of this subchapter, and by regulations of the Secretary of Labor for claims under part C of this subchapter, subject to the relevant provisions of subsections (b) and (d) of section 923 of this title, except that—

(A) in the case of a living miner, such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him or her from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity and over a substantial period of time;

(B) such regulations shall provide that (i) a deceased miner's employment in a mine at the time of death shall not be used as conclusive evidence that the miner was not totally disabled; and (ii) in the case of a living miner, if there are changed circumstances of employment indicative of reduced ability to perform his or her usual coal mine work, such miner's employment in a mine shall not be used as conclusive evidence that the miner is not totally disabled;

(C) such regulations shall not provide more restrictive criteria than those applicable under section 423(d) of Title 42; and

(D) the Secretary of Labor, in consultation with the Director of the National Institute for Occupational Safety and Health, shall establish criteria for all appropriate medical tests under this subsection which accurately reflect total disability in coal miners as defined in subparagraph (A).

(2) Criteria applied by the Secretary of Labor in the case of—

(A) any claim which is subject to review by the Secretary of Health and Human Services, or subject to a determination by the Secretary of Labor, under section 945(a) of this title;

(B) any claim which is subject to review by the Secretary of Labor under section 945(b) of this title; and

(C) any claim filed on or before the effective date of regulations promulgated under this subsection by the Secretary of Labor;

shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.

20 C.F.R. § 727.203

§ 727.203 Interim presumption.

(a) *Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:

(1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428 of this title);

(2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) of this title) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV_1	MVV
67″ or less	2.3	92
68″	2.4	96
69″	2.4	96
70″	2.5	100
71″	2.6	104
72″	2.6	104
73″ or more	2.7	108

(3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than the values specified in the following table:

Arterial pO_2 —	Arterial pCO_2 equal to or less than (mm. Hg.)
30 or below	70.
31	69.
32	68.
33	67.
34	66.
35	65.
36	64.
37	63.
38	62.
39	61.
40-45	60.
Above 45	Any value.

(4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment;

(5) In the case of a deceased miner where no medical evidence is available, the affidavit of the survivor of such miner or other persons with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment.

(b) *Rebuttal of interim presumption.* In adjudicating a claim under this subpart, all relevant medical evidence

shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:

(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

(c) *Applicability of Part 718.* Except as is otherwise provided in this section, the provisions of Part 718 of this subchapter as amended from time to time, shall also be applicable to the adjudication of claims under this section.

(d) *Failure of miner to qualify under the presumption in paragraph (a) of this section.* Where eligibility is not established under this section, such eligibility may be established under Part 718 of this subchapter as amended from time to time.

20 C.F.R. § 410.490

Interim adjudicatory rules for certain Part B claims filed by a miner before July 1, 1973, or by a survivor where the miner died before January 1, 1974.

(a) *Basis for rules.* In enacting the Black Lung Act of 1972, the Congress noted that adjudication of the large backlog of claims generated by the earlier law could not await the establishment of facilities and development of medical tests not presently available to evaluate disability due to pneumoconiosis, and that such claims must be handled under present circumstances in the light of limited

medical resources and techniques. Accordingly, the Congress stated its expectancy that the Secretary would adopt such interim evidentiary rules and disability evaluation criteria as would permit prompt and vigorous processing of the large backlog of claims consistent with the language and intent of the 1972 amendments and that such rules and criteria would give full consideration to the combined employment handicap of disease and age and provide for the adjudication of claims on the basis of medical evidence other than physical performance tests when it is not feasible to provide such tests. The provisions of this section establish such interim evidentiary rules and criteria. They take full account of the congressional expectation that in many instances it is not feasible to require extensive pulomonary function testing to measure the total extent of an individual's breathing impairment, and that an impairment in the transfer of oxygen from the lung alveoli to cellular level can exist in an individual even though his chest roentgenogram (X-ray) or ventilatory function tests are normal.

(b) *Interim presumption.* With respect to a miner who files a claim for benefits before July 1, 1973, and with respect to a survivor of a miner who dies before January 1, 1974, when such survivor timely files a claim for benefits, such miner will be presumed to be totally disabled due to pnuemoconiosis, or to have been totally disabled due to pnuemoconiosis at the time of his death, or his death will be presumed to be due to pneumoconiosis, as the case may be, if:

(1) One of the following medical requirements is met:

(i) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428); or

(ii) In the case of a miner employed for at least 15 years in underground or comparable coal mine employment, ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2)) as demonstrated by

values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV_1	MVV
67″ or less	2.3	92
68″	2.4	96
69″	2.4	96
70″	2.5	100
71″	2.6	104
72″	2.6	104
73″ or more	2.7	108

(2) The impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment (see §§ 410.416 and 410.456).

(3) With respect to a miner who meets the medical requirements in paragraph (b)(1)(ii) of this section, he will be presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment, or to have been totally disabled at the time of his death due to pneumoconiosis arising out of such employment, or his death will be presumed to be due to pneumoconiosis arising out of such employment, as the case may be, if he has at least 10 years of the requisite coal mine employment.

(c) *Rebuttal of presumption.* The presumption in paragraph (b) of this section may be rebutted if:

(1) There is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)), or

(2) Other evidence, including physical perfor ance tests (where such tests are available and their administration

is not contraindicated), establish that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)).

(d) *Application of presumption on readjudication.* Any claim initially adjudicated under the rules in this section will, if the claim is for any reason thereafter readjudicated, be readjudicated under the same rules.

(e) *Failure of miner to qualify under presumption in paragraph (b) of this section.* Where it is not established on the basis of the presumption in paragraph (b) of this section that a miner is (or was) totally disabled due to pneumoconiosis, or was totally disabled due to pneumoconiosis at the time of his death, or that his death was due to pneumoconiosis, the claimant may nevertheless establish the requisite disability or cause of death of the miner under the rules set out in §§ 410.412 to 410.462.